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In The
Supreme Court of the United States

SUSETTE KELO, et al.,

Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF OF THE GOLDWATER INSTITUTE, BLUEGRASS INSTITUTE FOR PUBLIC POLICY SOLUTIONS, CENTER OF THE AMERICAN EXPERIMENT, COMMONWEALTH FOUNDATION FOR PUBLIC POLICY ALTERNATIVES, ETHAN ALLEN INSTITUTE, EVERGREEN FREEDOM FOUNDATION, GEORGIA PUBLIC POLICY FOUNDATION, MACKINAC CENTER FOR PUBLIC POLICY, AND NATIONAL TAXPAYERS UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The **Goldwater Institute**, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advocates public policies founded upon the principles of limited government, economic freedom and individual responsibility. One of the central missions of the Goldwater Institute is studying and promoting the protection of private property rights.

The **Bluegrass Institute for Public Policy Solutions** is an independent, nonpartisan association of writers, speakers and thinkers who analyze state and local public policy in Kentucky, and suggest alternatives more in concert with the founding ideas of individual liberty, economic freedom, personal responsibility and a respect for others. Our mission is to change the way Kentuckians think about government. Enshrined in the Kentucky Bill of Rights and at the core of our mission is: *The right of acquiring and protecting property.*

The **Center of the American Experiment** is a nonpartisan, tax-exempt, public policy and educational institution, which brings conservative and free-market ideas to bear on the most difficult issues facing Minnesota and the nation.

The **Commonwealth Foundation for Public Policy Alternatives** is a nonprofit, nonpartisan, research

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[1] This brief is filed with the consent of the parties. No counsel to any of the parties to this matter authored this Brief in whole or in part. No person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

and educational institute based in Harrisburg, Pennsylvania. Dedicated to advancing the Founding principles of limited constitutional government, economic and political freedom, and personal responsibility for one's actions, the Commonwealth Foundation conducts policy analysis and research to improve the lives of all Pennsylvanians.

The **Ethan Allen Institute**, founded in 1993, is Vermont's independent, nonpartisan free market public policy organization. Its mission is to educate Vermonters in the fundamentals of a free society. The Institute believes that the human right of private property ownership is a key ingredient of a free society. The Institute concedes that governments may take private property for public use with the payment of just compensation, but it believes strongly that the power of government cannot lawfully be used to dispossess private property owners where the government's objective is not public use, but merely the government's desire to enlarge the tax base in support of government spending.

The **Evergreen Freedom Foundation** (EFF), founded in 1991, is a nonpartisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington. EFF's mission is to advance individual liberty, free enterprise, and responsible government. Among its core functions, EFF advocates for limited government and market solutions to reduce governmental regulatory functions.

The **Georgia Public Policy Foundation**, formed in the fall of 1991, is the only private, nonpartisan research and education organization in Georgia that focuses on state policy issues. Its members are a diverse group of Georgians that share a common belief that the solutions to

most problems lie in a strong private sector, not in a big government bureaucracy. In 2003, the Foundation testified before Georgia's state senators regarding eminent domain policy and practices in the state. The Foundation's commitment to limited government includes ensuring that government's constitutional ability to take private property for public use is never abused.

The **Mackinac Center for Public Policy** is a Michigan-based, nonprofit, nonpartisan research and educational institute dedicated to advancing policies that foster free markets, limited government, personal responsibility, and respect for property rights. The Mackinac Center is a 501(c)(3) organization founded in 1988.

The 350,000-member **National Taxpayers Union** is a nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and more accountable elected officials at all levels. NTU favors preserving the personal and property safeguards included in the United States Constitution and espouses the principle that private property rights are the foundation upon which a free society is built. The use of government power to seize private property through eminent domain, unless it is absolutely necessary for the public good, is, to NTU's membership, simply another form of taxation.

SUMMARY OF THE ARGUMENT

A 2004 Goldwater Institute Study provides compelling evidence that condemning private property for economic development is unnecessary and reasonable alternatives for redevelopment exist. Although there are legitimate reasons for invoking eminent domain, such as building

roads, bridges and military installations, the current practice of condemning private property in the name of redevelopment is rarely about blight removal or building public infrastructure and regularly about turning areas that produce little tax revenue into high revenue generators. This abuse of eminent domain power by local governments is not only unnecessary, but creates uncertainty about property rights and violates fundamental constitutional principles. Also, it is often counter-productive to the goals of economic development and revitalization.

The Fifth Amendment to the U.S. Constitution provides that "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." Such language was designed to limit government authority and reinforce common law protections of private property. First, the "due process" clause provides protection of private property by ensuring that government will not abuse its police powers. Second, the "takings" clause ensures that any government taking of private property must be for a "public use" and requires fair compensation to the owner.

Allowing the condemnation of private property for alleged public benefits such as increased tax revenue and economic development violates the U.S. Constitution by distorting what constitutes a public use. Such a result is contrary to the plain language of the Constitution and undermines an important protection for private property owners.

ARGUMENT

CONDEMNATION OF PRIVATE PROPERTY FOR THE BENEFIT OF ANOTHER PRIVATE PARTY IS UNNECESSARY FOR ECONOMIC DEVELOPMENT AND REASONABLE ALTERNATIVES EXIST

A 2004 Goldwater Institute policy study illustrates that condemning private property for economic development is unnecessary and reasonable alternatives to governmental resort to eminent domain exist.[2] The study examines several redevelopment projects including the revitalization of downtown Seattle, Washington. The study presents examples of economic redevelopment occurring without resort to eminent domain as well as explaining the problems associated with labeling an area as "slum or blighted" in an attempt to condemn private property for redevelopment purposes.

An example of redevelopment and revitalization occurring without resort to eminent domain involves downtown Seattle, Washington. In 1992, the historic Frederick & Nelson department store was abandoned. The former I. Magnin building stood vacant across the street by the end of 1994. Crime was on the rise and the sidewalks emptied at dusk. Homeless people slept in deserted storefronts.[3]

However, developers formed Pine Street Associates and implemented a private redevelopment plan. A group of

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[2] Mark Brnovich, *Condemning Condemnation: Alternatives to Eminent Domain*, Goldwater Institute Policy Report No. 195 (June 14, 2004).

[3] Todd Bishop and Christine Frey, *Resurgent Downtown Still Faces Challenges*, Seattle Post-Intelligencer, Monday, February 10, 2003.

private investors bought the former Frederick & Nelson building and traded it to Nordstrom Inc., the national retailer based in Seattle. In addition to a publicly financed parking garage,[4] the developer's plan called for Pine Street Associates to refurbish the old Nordstrom store and fill it with retail and office tenants. As Washington state courts narrowly construe municipal exercises of eminent domain, *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wash.2d 679, 694 n.8, 743 P.2d 793 (1987), redevelopment had to take place without condemnation of any private property. One of the private developers acknowledged that acquiring the property for the three-block redevelopment effort was difficult without being able to call on the power of eminent domain.[5] However, developers instead used techniques such as land swaps, individual and corporate investments, and commitments from current property owners to make the economic redevelopment occur.[6]

Today the intersection of Sixth Avenue and Pine Street is at the heart of a resurgent downtown Seattle. The sidewalks fill with pedestrians during peak shopping hours. Around downtown, shops and restaurants stay open into the night. Property crime is down. The population is climbing, and people can be seen walking the streets long after dark.[7]

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[4] This brief does not address the wisdom or necessity of whether government should be making such expenditures with taxpayer funds. Seattle, however, did not acquire the property through condemnation.

[5] Dave Copeland, *Seattle Can Identify With Pittsburgh's Plan C*, Pittsburgh Tribune-Review, Thursday, April 4, 2002.

[6] Brnovich at *supra* note 2.

[7] *Supra* note 3.

Downtown Seattle is a redevelopment project that city planners and private developers often cite. From 1996-1998, the project redeveloped three blocks, creating more than 1 million square feet of new retail space. Just months after the debut of Pacific Place and the new Nordstrom, retailers with stores downtown experienced a 15.8 percent increase in taxable sales, twice the average growth rate.[8] The number of downtown retail jobs grew an estimated 4.4 percent from 1995 to 2000.[9]

The redevelopment project in Seattle demonstrates that economic development can occur without resort to eminent domain. In the 1980's, Huntington Beach, California also undertook a downtown redevelopment project. The city initially relied upon mass condemnations and lavish public subsidies. As City officials tried to lure big developers to replace beach bungalows and surf shops with sterile high-rises made of stucco, condemnations shut down the local businesses that once gave the city its unique character. Moreover, many of these redevelopments failed. With persistent vacancies in downtown shops, mounting debt, and projects stalled for years, public money mostly bailed out developers without boosting the city's image. Other cities such as Newport Beach that did not establish redevelopment zones grew economically at rates that far outpaced Huntington Beach.[10]

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[8] Data from the City of Seattle's finance department.

[9] Puget Sound Regional Council analysis of state Employment Security Department data.

[10] Jim Hinch, *In Surf City, Rebuilding Strategy Has Fans, Critics*, The Orange County Register, November 24, 2001.

When the City proposed an idea in the late 1990s to condemn the Huntington Beach Mall and turn it over to private developers, discount retailers Montgomery Ward and Burlington Coat Factory, which owned stores at the mall, promised to fight any attempt to take their property and hand it over to someone else. Ultimately, the Huntington Beach City Council voted against using eminent domain to force the retailers out of the mall.[11] So the City decided to approach redevelopment by including the discount retailers rather than replacing them. It did not take long for a developer to produce a winning proposal to reinvigorate the mall into a Mediterranean-themed shopping center, without using eminent domain. The result was a development plan that was consistent with Huntington Beach's flavor.[12] Construction on Bella Terra, the long-awaited complex, began in summer 2002, and includes Burlington Coat Factory (Montgomery Ward has since gone bankrupt), as well as a large movie theater, restaurants and stores. This was all accomplished without taking a single property through eminent domain.[13] Instead, land assembly techniques including partnerships, joint ventures and cooperation with current property owners resulted in vibrant economic development project.

Another example of economic development occurring without resort to municipal condemnation involves Gilbert,

[11] *Property Rights Victories*, The Orange County Register, November 26, 2000.

[12] Jim Hinch, *Mall Project Seen as a Winner; Development – Huntington Hopes to Reverse a History of Plans Falling Through*, The Orange County Register, March 8, 2002.

[13] Curt Seeden, *The Huntington Beach Mall Is Officially on its Way to Becoming Bella Terra, the Long-Awaited Mediterranean-Themed Shopping Center*, The Orange County Register, July 18, 2002.

Arizona. The city has implemented a policy of purchasing small parcels from voluntary sellers, avoiding the use of eminent domain.[14] For instance, the city is spending $1.4 million to purchase and demolish a downtown apartment complex. Putting aside the issue of whether local governments should be making such investments, the city is not condemning the property, but purchasing it from a voluntary seller.[15] Recently, Gilbert officials accepted an offer from Oregano's Pizza Bistro to purchase another parcel owned by the city. The city purchased the land from private property owners and did not use eminent domain to acquire the property.[16] The experience in Gilbert demonstrates that the voluntary purchase of real property is another mechanism available to local governments to foster economic development.

At the same time, by threatening condemnation or including property within a "redevelopment" area, local governments may discourage economic development. For example, the redevelopment designation of an area of downtown Scottsdale, Arizona made it difficult for property owners to improve or sell their property.[17] Property owners and tenants in the redevelopment area were reluctant to make major improvements or investments

[14] Brian Powell, *Remarks Rile Gilbert Officials*, East Valley Tribune, September 26, 2003, p. A3.

[15] Brian Powell, *Gilbert Eyes Area for Redevelopment*, East Valley Tribune, March 15, 2003, p. 3.

[16] Brian Powell, *Gilbert accepts Oregano's Proposal*, East Valley Tribune, April 7, 2004.

[17] Laurie Roberts, *City lifts Noose but Keeps Gallows Intact*, The Arizona Republic, NE Community Section, June 13, 2001.

because their property could be condemned at any time.[18] Additionally, sales tax receipts in areas of the downtown Scottsdale redevelopment zone plummeted by as much as 42%.[19]

After the Scottsdale City Council repealed the redevelopment designation and the threat of condemnation in downtown Scottsdale, economic development increased. Property owners are expanding their businesses, adding floors and planning additions.[20] Construction has also begun on lofts, condominiums, shops and underground parking for a "Main Street Plaza" in downtown Scottsdale.[21] Ironically, economic development greatly accelerated once the threat of condemnation didn't hang over property owners located within the redevelopment zone.

Other property owners have experienced even greater frustration with their local government. In an attempt to stimulate economic development, Mesa, Arizona condemned 30 acres of land. After clearing 63 homes at a cost of $6 million to taxpayers, the land sits vacant because the private developer who was going to build on the site could not obtain financing.[22] Phoenix, Arizona residents experienced similar frustration when the city condemned a

[18] Mike Fimea, *Redevelopment Sites: Stay or Go?*, Arizona Business Gazette, August 29, 2002.

[19] Peter Corbett, *Scottsdale to Revisit Fate of Properties Near Canal*, The Arizona Republic, September 13, 2002.

[20] Elizabeth Bullington, *Condemnation Cloud Lifts, so Downtown Redevelops*, Scottsdale Republic, August 20, 2004.

[21] Peter Corbett, *Work Starts on Downtown's Main Street Plaza Project*, Scottsdale Republic, November 3, 2004.

[22] Robert Robb, *Count on City-Driven Projects to Fail*, The Arizona Republic, September 21, 2001.

grocery store and other small businesses to clean up a blighted area. After condemning various properties, no viable proposal for development was acceptable and the area sat vacant, continuing to harbor criminal activity.[23] One homeowner and her 87-year-old mother were forced from their home by Phoenix officials so a developer could build offices. The residents were forced to relocate themselves when the city couldn't find a suitable property that they could afford. Four years after condemning their property for economic redevelopment, the location of their former house still sat as a vacant lot.[24]

Property owners and taxpayers in San Jose, California were negatively impacted by the threat of condemnation as well. The redevelopment designation in San Jose resulted in the Santa Clara County Association of Realtors warning that homes located within a new "Strong Neighborhoods Initiative" boundary would be difficult to sell and may lose their value as a result.[25] The San Jose Redevelopment Authority also earned a reputation as a take-first, ask-questions-later-agency as a result of its exercise of eminent domain. Ultimately, the downtown development plan flamed out and taxpayers were left with

[23] Gr[illegible]ela Sevilla and Jesus Lopez, Jr., *Crime Magnet is Razed Rainbow Market comes Down in Bid to Rebuild Area*, The Arizona Republic, August 12, 1999; *See also*, David Cieslak, *Victims' Family Vows to Take Back the Area; Violence Plagues 'Rock Block' Neighborhood*, The Arizona Republic, January 13, 2004.

[24] Howard Fischer, *They Came, They Saw, They Evicted; Are You in the Path of Urban Renewal? That Could be Too Bad*, Phoenix New Times, October 4, 1989.

[25] Sharon Simonson, *Realtors Fear Effect of City Plan*, Silicon Valley Business Journal, September 20, 2002.

an estimated $1.5 billion in debt. All the while, property values continue to fall.[26]

Although condemnation of private property through eminent domain can be legitimate in some instances, such as building public roads or parks, the process of condemning property has rarely been about blight removal and mainly about turning areas that produce little tax revenue, such as, churches, old neighborhoods and small businesses, into sales-tax smorgasbords, such as, strip malls, Targets, Wal-Marts, and Costcos.[27] Many of these current development projects would fail to meet the standard set forth by the U.S. Supreme Court in *Kohl v. U.S.*, 91 U.S. 367 (1875). The Court took a narrow view of what constitutes a public use and wrote that the government could exercise eminent domain when it was, "important to appropriate lands or other property for its own purposes, and to enable it to perform its functions, – as must sometimes be necessary in the case of forts, lighthouses, and military posts or roads...." The Court explained that eminent domain was a right belonging to a sovereignty to take private property for its own uses, and not for those of another. *Id.* at 373-374.

However, the Court's ruling in the 1954 case *Berman v. Parker,* 348 U.S. 26 (1954), opened the door for condemning private property to remove slums and urban blight. Local governments have taken this crack and burst open the door. But the situation in *Berman* is different

[26] Editorial, *Redeveloping Redevelopment*, Silicon Valley/San Jose Business Journal, October 31, 2003.

[27] Steven Greenhut, *The Blight of Eminent Domain, Ideas On Liberty*, Foundation for Economic Education's Monthly Magazine, September, 2002, p. 10.

from many of the situations faced by local governments today. In *Berman*, the court was confronted with a unique situation where most of the dwellings in question were beyond repair, had outside toilets, and had no wash facilities. *Id.* at 30. Today, as is in the case in Connecticut, the proposed use of eminent domain is designed to maximize economic development and local government tax revenues. This is commonly referred to as the "fiscalization" of land use.[28]

Fortunately, state courts across the nation are becoming more wary of government's abuse of power. Proponents of private property rights have achieved significant victories in Michigan, Illinois, Massachusetts and Pennsylvania.[29] Judges are recognizing that eminent domain abuse not only violates the public trust but also a long-held principle of American law that proscribes favors and

[28] Brnovich at *supra* note 2.

[29] In *Wayne v. Hathcock*, 471 Mich. 445 (2004), the Michigan Supreme Court made an independent determination of what constitutes a public use and overturned its earlier decision in *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981), thus providing less discretion to local governments to use condemnation for economic development purposes. In *Southwestern Illinois Development Authority v. National City Environmental*, 199 Ill. 2d 225, 768 N.E.2d 1 (2002), the Illinois Supreme Court refused to accept the redevelopment authority's argument that the use of eminent domain to increase economic growth was a public use. In *City of Springfield v. Dreison Investments*, 11 Mass. L. Rep. 379, 2000 Mass. Super. LEXIS 131 (2000), the Massachusetts Superior Court found that the "all-consuming" goal of attracting a baseball team was primarily for private interests and disallowed a taking of private property to build a private baseball stadium. The Pennsylvania Commonwealth Court reached a similar result in *Condemnation of 110 Washington St.*, 767 A.2d 1154 (Pa. Commw. Ct.), *review denied*, 2001 Pa. LEXIS 1544 (July 19, 2001). The court held that it was an unconstitutional delegation of authority to provide condemnation power to a private developer.

preferences accorded by government to individuals or identifiable groups.[30] Justice Samuel Chase articulated the principle in *Calder v. Bull*, 3 U.S. 386 (1798): "[I]t is against all reason and justice for a people to entrust [government] with the power to . . . [take] property from A and give it to B."

If provided with unfettered discretion, local governments can come up with a rationale that the public will benefit in some way from the taking of private property for economic development purposes. Such discretion is contrary to the plain language of the Fifth Amendment that takings of private property should only be for a public use. To allow local governments to expand this definition to an economic benefit jeopardizes important long standing Constitutional protections.

Ultimately, experiences in places such as Seattle, Huntington Beach, Gilbert and Scottsdale are demonstrating that eminent domain does not need to be a primary tool for urban development. Local governments can learn from these and other exampies and create land assembly techniques that do not require the use of eminent domain. Such techniques include, but are not limited to: negotiated purchase, private investment, escalating leases, limited partnerships, joint ventures, and land swaps. By using methods that do not rely on condemnation of property, governments not only respect the rights of property owners but ensure stability within the market.

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[30] Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation*, (New Brunswick & London: Transaction Publishers, 1997) p. 229.

This is important because the government's role in maintaining a successful economy should be to protect private property owners and investors, not to confiscate and reallocate at will. Often, resort to the despotic power of condemnation causes more problems than it solves. Most important, the use of condemnation for economic development infringes on an important constitutional protection.

CONCLUSION

Allowing local governments to condemn private property for economic development purposes is unnecessary and minimizes important Constitutional protections. Accordingly, the decision of the Connecticut Supreme Court should be overturned.

Respectfully submitted,

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